ABDUL MOHD KHALID HJ ALI & ORS

v.

DATO' HJ MUSTAPHA KAMAL & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-555-97]
12 NOVEMBER 2002

CIVIL PROCEDURE: *Parties - Proper parties to be sued - Suit against executive chairman of company - Whether executive chairman personally liable for breach by company - Whether company a separate legal entity - Whether executive chairman right and proper party to proceedings*

COMPANY LAW: *Separate legal entity - Suit against executive chairman of company - Whether executive chairman personally liable for breach by company - Whether company a separate legal entity - Whether company should be sued instead*

The plaintiffs, who were seconded to Rajo Sdn Bhd by the second defendant for the purpose of negotiating to avoid or reduce claims made by certain house buyers against Rajo Sdn Bhd – which they succeeded in doing – brought this present claim against the first and second defendants as neither Rajo Sdn Bhd nor the second defendant had made any payments to the plaintiffs. At the initial stage, Rajo Sdn Bhd had been wholly owned by the second defendant, and the first defendant, who was the executive chairman of Rajo Sdn Bhd at that material time, had on behalf of Rajo Sdn Bhd informed the plaintiffs that Rajo Sdn Bhd had agreed to pay them 30% of the RM2.5M as claimed by the house buyers if they succeeded in avoiding the claims made by the house buyers. Consequently, the first defendant applied to this court to make a ruling regarding a preliminary issue as to whether the first defendant was the right and proper party in these proceedings.

Held:

[1] In this case, Rajo Sdn Bhd and the second defendant were two separate parties and they were certainly distinct from the first defendant. The first defendant, acting in his capacity as the executive chairman of Rajo Sdn Bhd, should not be held liable in his personal capacity to pay for the plaintiffs' claim. Rajo Sdn Bhd was a separate legal entity notwithstanding the fact that the first defendant was its executive chairman and therefore,

if Rajo Sdn Bhd breached its contracts or incurred liabilities, the company and not its members must be sued. Hence, whatever claims that the plaintiffs had, should be made against Rajo Sdn Bhd or the second defendant, rather than the first defendant, who was not the right and proper party to the proceedings. (pp 96d, 98c-d, 101h & 102a)

[Claim against first defendant dismissed.]

Case(s) referred to:

Abdul Manaf Mohd Ghows & Ors v. Nusantara Timur Sdn Bhd & Ors [1997] 4 CLJ 437 ***(foll)***

Bank Kerjasama Rakyat Malaysia Bhd v. Tetuan Haranay, Roni & Anikah & Ors [1999] 1 CLJ 569 ***(foll)***

Biggerstaff v. Rowatt's Wharf, Limited, Howard v. Rowatt's Wharf, Limited [1896] 2 Ch 93 ***(refd)***

Byrne v. Londonderry Tramway Co [1920] 2 IR 457 ***(refd)***

Double Acres Sdn Bhd v. Tiarasetia Sdn Bhd [2000] 7 CLJ 550 ***(foll)***

Hoare v. Silverlock [1848] 12 QB 624 ***(refd)***

Loughney v. Caledonian Rly Co [1902] 39 Sc LR 289 ***(refd)***

Lumley v. Gye [1853] 2 E & B 216 ***(refd)***

R v. Aspinall [1876] 2 QBD 48 ***(refd)***

Re Application By Yee Yut Ee [1978] MLJ 142 ***(refd)***

Salomon v. A Salomon & Co Ltd [1897] AC 22 ***(foll)***

United Malayan Banking Corp Bhd v. Tan Lian Keng & Ors [1990] 1 MLJ 280 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 16(5)
Evidence Act 1950, ss. 91, 92
Rules of the High Court 1980, O. 33 r. 2

For the plaintiffs - Ravichandran Dorados; M/s Ravi Shashi & Co
For the 1st defendant - M Kalaichelvan; M/s Abd Halim Ushah & Assocs

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Introduction

The first defendant by way of a summons in chambers in encl. 29 sought this court to make a ruling under O. 33 r. 2 of the Rules of the High Court 1980 ("RHC") in regard to a preliminary issue as to whether the first defendant is the right and proper party in these proceedings. This preliminary issue also

brings into sharp focus another equally pressing issue of whether there is in existence consideration advanced by the plaintiffs and where the first defendant is said to be liable to pay the plaintiffs in his personal capacity. It was part and parcel of my judgment that these issues can readily be decided based on the pleadings and the documents that were filed together with the relevant affidavits. There was no necessity, in my judgment, for witnesses to be called in order to ascertain these issues.

Facts Of The Case

Within a narrow compass, the facts may be stated as follows.

Sometime in December 1998, a company known as Rajo Sdn Bhd developed a housing estate known as Taman Kantan Permai, Kajang, Selangor Darul Ehsan (hereinafter referred to as the "said project"). At the initial stage, Rajo Sdn Bhd was wholly owned by MK Associates Sdn Bhd – the second defendant. The first defendant by the name of Dato' Hj Mustapha Kamal had through MKN Holdings Sdn Bhd (hereinafter referred to as the "MKN Holdings") owned 40% of the equity in the second defendant's company and the balance 60% equity were owned by the other parties.

Sometime in 1992, MKN Holdings and its other shareholders sold all their equities in the second defendant's company, excluding Rajo Sdn Bhd, to Sateras Resources (M) Bhd. The second defendant's company then transferred 40% of its shares in Rajo Sdn Bhd to MKN Holdings. Later, in the early part of 1993, all the shares that were held by MKN Holdings in Rajo Sdn Bhd were sold by MKN Holdings to Mohamed Kamal bin Hussain. This meant that all the assets and liabilities of Rajo Sdn Bhd were taken over by Mohamed Kamal bin Hussain. Now, prior to the completion of the said transfer, the first defendant had paid a sum of RM4 million through MKN Holdings to Rajo Sdn Bhd for the purpose of assisting the latter to settle its debts and liabilities.

It seemed that the house buyers from the said project had claimed a total sum of RM2.5 million from Rajo Sdn Bhd for the delay in delivering vacant possession of their properties. The plaintiffs together with a person by the name of Wan Roshidi who was a staff of the second defendant, at the material time, were seconded to Rajo Sdn Bhd by the second defendant for the purpose of negotiating with the house buyers in the said project in order to avoid or reduce the claims made by the house buyers against Rajo Sdn Bhd. At the material time when the first defendant was heading Rajo Sdn Bhd as the executive chairman, he had on behalf of the said company informed the plaintiffs and

Wan Roshidi that the said company had agreed to pay them 30% of the RM2.5 million as claimed by the house buyers of the said project in the event they succeeded in avoiding the claims made by those house buyers. This was certainly in line with the terms as stipulated and as contained in para. 7 of the letter of appointment dated 1 June 1993 as seen in exh. "MK7" of encl. 28 which was issued to all the plaintiffs by Rajo Sdn Bhd. That letter dated 1 June 1993 was signed by someone for the first defendant and it was worded in this way:

RAJO SDN BHD
(A Subsidiary of M.K. Associates Sdn. Bhd.)

Our Ref: MKA/PF/115

1st June, 1993

TEMPORARY APPOINTMENT FOR THE POST OF DEVELOPMENT OFFICER

We are pleased (to) appoint you on a temporary basis to the above position in this Company subject (to) the terms of your secondment letter from M.K. Associates Sdn Bhd dated 25th May, 1993 as well as to the following terms and conditions:

1. Function

   a) To negotiate with house purchasers of Phase 1A Taman Kantan Permai with the objective of obtaining their consent to waive or reduce the quantum of Liquidated and Ascertained Damages payable by Rajo Sdn Bhd for late delivery of houses.

   b) To act as liaison officer during the defects liability period to ensure that complaints by house buyers are attended to in due time and in proper manner, with authorisation to instruct Wajib Juta, MKSK Landscaping and contractors specifically on house buyers complaints only.

2. Remuneration

   You shall be paid an allowance of RM400.00 per month less lawful deduction. Any additional allowances shall be decided by the Executive Chairman.

3. Fringe Benefits

   You will be entitled to all the fringe benefits relating to leave, holidays, medical benefits etc, in accordance with the existing terms and conditions of service of M.K. Associates Sdn Bhd.

4. Place of Work

You shall be based at the premises of Rajo Sdn Bhd.

5. Working Hours

By nature of your task, you are exempted from complying with the normal working hours at 9.00 a.m. to 5.00 p.m. However, it is mandatory that you be present in the office of Rajo Sdn Bhd for at least one hour ie. between 10.00 a.m. to 11.00 a.m. or any other time as directed.

You shall also comply with a duty roster as instructed by the Project Manager of Rajo Sdn Bhd.

6. Reporting

You shall report directly to the Project Manager of Rajo Sdn Bhd and comply with all the reporting formats as directed by the Project Manager. You shall also provide full information to a coordinating officer who shall act as liaison between yourself and the Executive Chairman. You are also allowed to refer to certain designated senior officers of M.K. Associates Sdn Bhd for decisions over matters which you are not authorised to make.

7. Targets & Performance

By 25th of June, 1993 you shall submit a report to the Acting Group Managing Director as to:

a) confirmed cases i.e. of purchasers who have given written notice(s) accepting reduced LAD(s) and the total amount of saving(s).

b) Estimate of further success rate with analysis of cases.

By 25th July, 1993 you shall submit a second assessment on actual success rate and revised target to Group Finance Manager.

As an overall target you and your three other colleagues are to collectively reduce the LAD(s) by an amount of RM1.2M.

Subject to performance, the Company shall compensate you with fair incentives, quantum of which is to be decided at its sole discretion.

8. Restrictions

a) You are not authorised to collect any monies on behalf of the Company.

b) You are not allowed to appoint any unauthorised persons to assist you in (the) performance of your duties.

c) You are not authorised to make any decisions on the late payment interest charges payable by (the) purchasers nor decisions on contra against renovation payments outstanding.

9. Code of Behaviour

a) You are to always protect the image of the Company.

b) You are to always be polite and courteous to the house buyers irrespective of the circumstances of your meeting with them.

c) You shall always be properly dressed when you meet with house buyers even if it is outside working hours.

d) It is a condition of your employment that you shall devote the whole of your time, attention and ability exclusively to the business of the Company and shall not at any time during your employment with this Company, be involved in any other employment of business whatsoever without the prior consent in writing from the Company.

e) In the course of your duties you are strictly forbidden from getting yourself involved in corrupt practice, drug abuse or any other criminal activities including fraud, cheating etc.

10. Other Terms And Conditions

In respect to the general terms and conditions of service, you shall still be subject to the conditions attached to your appointment with M.K. Associates Sdn Bhd.

11. Period of Secondment

Your appointment shall be from 1st June, 1993 to 15th August, 1993 and shall be extended further if necessary. However, this period is subject to your rights to exercise an option which has been given to you by M.K. Associates Sdn Bhd, in a letter dated 25th May, 1993.

12. Reappointment

In the exercise of your option, as provided in item (10) above, should you choose to take up appointment with Rajo Sdn Bhd then, in such an event you shall execute a separate letter of appointment with us.

If the above offer is acceptable to you, please sign and return the duplicate copy of this letter.

Yours faithfully,

Sgd. (Illegible)
DATO' HJ MUSTAPHA KAMAL HJ ABU BAKAR
Executive Chairman

c.c.: M.K. Associates Sdn Bhd
Attention: Admin/Personnel Department

I take judicial notice that the alphabet "f" that appears before the name must necessarily mean that someone had signed on behalf of the said Dato'. The court would certainly take judicial notice of matters where persons of ordinary intelligence are acquainted with. A string of authorities may be cited on this point and I shall list them as follows:

(1) *Byrne v. Londonderry Tramway Co* [1920] 2 IR 457 at 480;

(2) *Hoare v. Silverlock* [1848] 12 QB 624 at 633;

(3) *Lumley v. Gye* [1853] 2 E & B 216 at 267;

(4) *R v. Aspinall* [1876] 2 QBD 48 at 61, 62; and

(5) *Loughney v. Caledonian Rly Co* [1902] 39 Sc LR 289.

Now, that letter too was written on Rajo Sdn Bhd's letter head. On 22 June 1994, approximately 1 1/2 years after MKN Holdings sold its shares in Rajo Sdn Bhd, the first defendant resigned his position as the executive chairman of Rajo Sdn Bhd (see exh. "MK9" of encl. 28). The plaintiffs on their part, in due course, terminated their services with the second defendant and they officially commenced work with Rajo Sdn Bhd on a full time basis and they were also instructed to return their hand phones (see the memorandum dated 23 April 1994 as seen in exh. "MK10" of encl. 28 and the memorandum dated 27 April 1994 as seen in exh. "MK11" of encl. 28). It must be borne in mind that the plaintiffs succeeded in persuading the house buyers of the said project from instituting their claims against Rajo Sdn Bhd for late delivery of vacant possession. Thus, the plaintiffs had provided the necessary consideration. But unfortunately, neither Rajo Sdn Bhd nor the second defendant had made any payments to the plaintiffs. Since Rajo Sdn Bhd or the second defendant had failed to make the necessary payments to the plaintiffs, the latter then brought the present suit against the first and the second defendants.

For record purposes, the plaintiffs succeeded in obtaining judgment in default against the second defendant on 10 February 1992 but they have yet to enforce the said judgment against the second defendant.

Assessment Of The Available Evidence

It was clear as crystal that the plaintiffs' claim was based on the letter dated 1 June 1993 that was reproduced earlier. That letter in exh. "MK7" of encl. 28 was issued by Rajo Sdn Bhd and any monetary incentives agreed upon by the parties were clearly stated in para. 7 of that letter which was worded like this:

> As an overall target you and your three other colleagues are to collectively reduce the LAD(s) by an amount of RM 1.2 million. Subject to performance, the company shall compensate you with fair incentives, quantum of which is to be decided at its sole discretion.

That letter, as I said, was signed on behalf of the first defendant in the first defendant's capacity as the executive chairman of Rajo Sdn Bhd. It can also be inferred that that letter was not signed by the first defendant personally. Even if that letter was personally signed by the first defendant it was so signed in the first defendant's capacity as the "executive chairman" of Rajo Sdn Bhd. It follows therefore that the "fair incentives" in monetary terms would be decided by Rajo Sdn Bhd and not by the first defendant personally. It was sought to argue by the plaintiffs that the first defendant was personally liable to pay the "fair incentives" in monetary forms to the plaintiffs because it was the first defendant who had made that promise "in his personal capacity as well as one of the executive chairmen of the second defendant." At this juncture, the case of *Abdul Manaf Mohd bin Ghows & Ors v. Nusantara Timur Sdn Bhd & Ors* [1997] 4 CLJ 437 comes to the forefront. That case emanated from the Court of Appeal (Siti Norma Yaakob, Abu Mansor and Denis Ong JJCA) where the Court of Appeal held that an agreement that was executed by the company directors would not make them personally liable under the agreement. In that case, the facts may be stated as follows. The first to the tenth appellants ("the vendors") were the shareholders of a private limited company known as Seri Naga Construction Sdn Bhd ("Seri Naga"). On 3 November 1986, the vendors entered into a sale and purchase agreement ("the agreement") with the first respondent ("NusantaraTimur") for the sale of their entire shareholdings in Seri Naga for a consideration of RM1 million. Nusantara Timur made a deposit of RM150,000 towards the purchase price with the balance of RM850,000 to be made on or before 3 December 1986. Nusantara Timur defaulted in their obligation under the agreement. It was alleged that

there was a subsequent agreement between the parties that the second and the third respondents, who were the directors of Nusantara Timur, undertook to assume liability personally for the balance of the purchase price by agreeing to settle the outstanding amount due under a loan taken earlier by one of the appellants. The vendors sued the three respondents for: (i) the sum of RM850,000; (ii) the interest calculated from the date of default to the date of judgment; (iii) interest on the judgment sum at 8% per annum from the date of judgment to the date of realisation; and (iv) damages. The trial judge entered judgment against Nusantara Timur in respect of the first three claims but dismissed the vendors' prayer for damages and the alternative claims by the vendors and the remaining appellants against the second and the third respondents for the recovery of the balance of the purchase price of the shares as well as damages for breach of undertakings allegedly given by them. The issue was whether the trial judge's dismissal of the prayer for damages and the alternative prayers by all the appellants against the second and third respondents had been correctly made. In dismissing the appeal, the Court of Appeal held that Nusantara Timur had breached the agreement by not paying the balance of the purchase price of RM850,000 within the completion date. The only damage the vendors could have probably suffered was being deprived of the use of the balance of the purchase price, which had since been compensated with interest. The additional claims against Nusantara Timur must, according to the Court of Appeal, therefore fail. The Court of Appeal also held that the fact that the agreement was executed by the second and the third respondents as directors of Nusantara Timur would not make them personally liable for the purchase price. Further, there was no evidence both oral and documentary to establish that the second and the third respondents had held themselves out to be personally liable for the balance of the purchase price. There was also no conclusive evidence of any undertakings, oral or documentary, given by the second and the third respondents to assume the first respondent's liability under the agreement. The Court of Appeal further held that the trial judge had, therefore, made the right decision when he ruled that damages had not been proven against the second and the third respondents. Siti Norma Yaakob JCA (now FCJ) delivering the judgment of the Court of Appeal said at pp. 445-446 of the report:

> The fact that the agreement was executed by the second and third respondents as directors of Nusantara Timur does not make the second and third respondents personally liable for the balance of the purchase price. The liability for such payment under the agreement is solely Nusantara Timur's, the contracting party. We can do no better than to quote the trial judge's reasoning on this:

> A company incorporated under the Companies Act 1965 has its own separate legal entity, distinct from its members and officers. It can sue and be sued in its own name and, being an artificial person, it can only act through its directors and officers. It enters into an agreement through its directors and authorised officers. A director or an authorised officer of an company who executes an agreement on its behalf is merely acting as an agent of the company and is thereby not personally liable for the breaches or acts of the company, unless there are express provisions in the agreement or other document to the contrary making the director or officer personally liable for the breaches or acts of the company.

> There is also a finding by the trial judge that there is no evidence both oral and documentary to establish that the second and third respondents had held themselves out to be personally liable for the balance of the purchase price. There is no reason why we should not accept this finding and in any event, Mr Periasamy, learned counsel for the appellants, did not make any submission on this point.

Clearly, therefore, it is a correct statement of the law to say that a company that has been incorporated under the Companies Act 1965 has a separate legal entity distinct from that of its members and the company can only act through its directors or officers who have been given the authority to act.

In *Double Acres Sdn Bhd v. Tiarasetia Sdn Bhd* [2000] 7 CLJ 550, I vigorously applied the case of *Abdul Manaf Mohd bin Ghows & Ors v. Nusantara Timur Sdn Bhd & Ors (supra)* and I ruled that one Teok Kian Seng who held the post of the director of Double Acres Sdn Bhd was not personally liable for breaches committed by the company and, consequently, I held that the defendant in that case did not have a cause of action against the said director. After referring to the case of *Abdul Manaf Mohd bin Ghows & Ors v. Nusantara Timur Sdn Bhd & Ors (supra)*, this was what I said in *Double Acres Sdn Bhd v. Tiarasetia Sdn Bhd (supra)* (see pp. 574-575 of the report):

> ... and flowing from this, TKS was obviously not personally liable for the breaches by DASB, if at all those breaches were to exist. Tiara had in its counterclaim cited DASB and that being the case Tiara had no cause of action against TKS in his personal capacity. Section 132(1) of the Companies Act 1965 enacts that:

> A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office.

A director too must exercise his discretion *bona fide* in what he considers to be in the interests of the company *(Re Smith & Fawcett Ltd* [1942] Ch 304, 306). A director who deliberately acts contrary to the company's interests is said to act in a manner which is not *bona fide* (*Marchesi v. Barnes* [1970] VR 434, 438). Thus, the primary duty of a director is to act in the interests of the company of which he is a director. The test to adopt as enunciated by the Singapore's Court of Appeal in the case of *Intraco Ltd v Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313, 325 would be: whether 'an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the (company).' It is implicit in the duty to act honestly to also act in the best interests of the company. The court in *Lim Koei Ing v. Pan Asia Shipyard & Engineering Co Pte Ltd* [1995] 1 SLR 499, 509 was of the view that 'a director must not put himself in a position where his duty and interest conflict; nor must he use the powers and assets entrusted to him for improper purposes.' A director too must exercise reasonable diligence (*Byrne v. Baker* [1964] VR 443, 450, 451; and *Straits & Island General Insurance Sdn Bhd v. Lawrence Chung Hee Menn & Ors* [1991] 2 CLJ 1024; [1991] 3 CLJ (Rep) 783) but there is no necessity for the director to exhibit any skill or be careful when carrying out his duties. Section 132(5) of the Companies Act 1965 enacts that:

> This section in addition to and not in derogation of any other written law or rule of law relating to the duty or liability of directors or officers of a company.

and in essence it preserves the common law duty of care. It was rightly held in *Re City Equitable Fire Insurance Co* [1924] All ER Rep 485 to the effect that a person need not display nor exhibit a greater degree of skill than may reasonably be expected of a person of his knowledge and experience. A director owes a duty of care not to cause loss to the company by an act of negligence. It is indeed onerous to be a director of a company because as a director the individual is considered to be the agent of a company for the purpose of imputing criminal breach of trust under s. 409 of the Penal Code. For this proposition an array of authorities may be cited. For starters, the following authorities would suffice: *Tay Choo Wah v. Public Prosecutor* [1976] 2 MLJ 95; *Tan Sri Tan Hian Tsin v. Public Prosecutor* [1979] 1 MLJ 73; *Chang Lee Swee v. Public Prosecutor* [1985] 1 MLJ 75 and *Lai Ah Kau & Anor v. Public Prosecutor* [1988] 3 MLJ 391. Now as a director of DASB, TKS duties and liabilities are governed by s. 132(1) of the Companies Act 1965 but it certainly cannot extend beyond the parameters as set out therein. To say that TKS was personally liable for the breaches by DASB would be stretching the law too far especially when TKS was not a party to any of the agreements alluded to somewhere in this judgment. Incidentally, s. 354 of the Companies Act 1965 gives the court the necessary power to relieve directors from the

consequences of their negligence, default, breach of duty or breach of trust. But there was no necessity for me to invoke s. 354 of the Companies Act 1965 because TKS was not guilty of those defaults. The cases of R*e Duomatic Ltd* [1969] 2 Ch 365, 375; and *Re Ena Jainab Abdeen* [1930] SSLR 212, 216 categorically laid down the requirements before the court could relieve directors under s. 354 of the Companies Act 1965 and these requirements may be stated in these terms:

(1) that the director had acted honestly;

(2) reasonably; and

(3) so it is fair to excuse the director having regard, always, to all the circumstances of the case.

Now, in the context of the present case, Rajo Sdn Bhd and the second defendant are two separate parties and they are certainly distinct from Dato' Hj Mustapha Kamal – the first defendant. Rajo Sdn Bhd and the second defendant have their own rights and liabilities. In so far as the first defendant was concerned, I have this to say. The first defendant had acted in his capacity as the executive chairman of Rajo Sdn Bhd and in that capacity had offered the monetary incentives for the benefit of Rajo Sdn Bhd and, consequently, the first defendant should not be held liable in his personal capacity to pay for the plaintiffs' claim. Furthermore, there was no documentary evidence to show as proof thereto that the first defendant had offered any monetary incentives to the plaintiffs in his personal capacity or had agreed to be responsible for Rajo Sdn Bhd's liabilities. In fact, all the documents that have been filed in the context of encl. 29 showed that the first defendant was, at all material times, acting in the capacity as the executive chairman and had acted on behalf of Rajo Sdn Bhd. It was part and parcel of my judgment that the "fair incentives" in monetary terms that were offered by the first defendant in his capacity as the executive chairman of Rajo Sdn Bhd and on behalf of the said company to the plaintiffs should not be placed on the shoulders of the first defendant. In my judgment, the first defendant in his individual capacity should not be held accountable to the claims advanced by the plaintiffs.

To understand the separate legal personality of a company, perhaps reference to s. 16(5) of the Companies Act 1965 should be made and there it enacts as follows:

Effect of incorporation

(5) On and from the date of incorporation specified in the certificate of incorporation but subject to this Act the subscribers to the memorandum

> together with such other persons as may from time to time become members of the company shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the functions of an incorporated company and of suing and being sued and having perpetual succession and a common seal with power to hold land but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is provided by this Act.

which means that incorporation brings forth the following effects:

(a) that the company is a body corporate with the powers of an incorporated company;

(b) that it may sue and be sued in its own name;

(c) that it has perpetual succession;

(d) that it may own land; and

(e) that the liability of its members may be limited.

But, alas, the separate legal personality of a company is not specifically spelled out in the Companies Act 1965 and that is certainly a pity. It would be correct to say that the whole scheme of the Companies Act 1965 is based upon the company's separate existence. The case of *Salomon v. A Salomon & Co Ltd* [1897] AC 22, House of Lords, is a classic case on the separate legal personality of a company. In that case, Salomon was a prosperous boot and shoe manufacturer. He ran the business as a sole trader under the style of "A Salomon & Co." Salomon was married and he had five children. All his children pestered him for a share in the business. Salomon then decided to incorporate his business as a limited liability company. He gave one share each to his wife and five of his children and he himself took 20,001 shares. The business was then transferred to the company, and in consideration thereof debentures were issued to Salomon. But Salomon continued to run the business as before. The business floundered. Salomon was unable to salvage the company and the company was put into liquidation. There were enough assets to pay off the secured creditors including Salomon himself who was a debenture holder. But the unsecured creditors were left stranded. The liquidator sued Salomon. The Court of Appeal held that he was liable to indemnify the company against the losses. However, the House of Lords reversed this decision and held that incorporation of a company created a separate person. The House of Lords also held that even though the business of the company was the same as before and the same person managed the business and with the same hands that

received the profits, yet the company was not an agent or a trustee for the members. The House of Lords categorically held that the members were not liable in respect of the company's obligations.

As demonstrated, the case of *Salomon v. A. Salomon & Co Ltd* showed that while Salomon managed the business solely by himself, yet in law Salomon and the company were separate persons. This separateness is a result of the incorporation of the company notwithstanding the fact that only one person owns and controls the company.

Here, in the present case Rajo Sdn Bhd was a separate entity notwithstanding the fact that the first defendant was its executive chairman. The correct proposition of the law is in this manner. As a general rule, the company and its members are separate legal entities in law. Flowing from that, it is also a correct proposition of the law to say that the company's liabilities are entirely its own and not those of its members. Thus, if Rajo Sdn Bhd breaches its contracts or incurs legal liabilities, the company must be sued and not its members. Likewise here, the first defendant cannot be sued even though he was the executive chairman of Rajo Sdn Bhd.

The second plaintiff affirmed an affidavit on his own behalf and on behalf of the first and the third plaintiffs in encl. 30 on 27 September 2000 and at para. 10 thereto he averred that the issue in this case was in regard to the first defendant's capacity as the executive chairman of the second defendant. Whereas in exh. "MK7" of encl. 28 which was reproduced earlier, it showed that the first defendant was the executive chairman of Rajo Sdn Bhd.

The second plaintiff also affirmed another affidavit on his own behalf and on behalf of the first and the third plaintiffs in encl. 35 on 4 January 2001 and at para. 15 thereto he also averred that the first defendant had promised on behalf of the second defendant to pay the plaintiffs for the special task and that the promise was made by the first defendant in his capacity as the executive chairman of the second defendant and as the person having full authority to decide on his own behalf and on behalf of the second defendant. Whereas, again, in exh. "MK7" of encl. 28 which was reproduced earlier, it showed that the first defendant was the executive chairman of Rajo Sdn Bhd.

It was part and parcel of my judgment that exh. "MK7" of encl. 28 which was a letter as reproduced earlier showed that the first defendant was the executive chairman of Rajo Sdn Bhd and that the averments of the second plaintiff in encl. 30 at para. 10 and in encl. 35 at para. 15 were mere attempts to contradict the letter in exhibit "MK7" of encl. 28 by stating that the first

defendant was the executive chairman of the second defendant. On the rigours of ss. 91 and 92 of the Evidence Act 1950, I must refer to the case of *Bank Kerjasama Rakyat Malaysia Bhd v. Tetuan Haranay, Roni & Anikah & Ors* [1999] 1 CLJ 569 where Clement Skinner JC (now judge) aptly said at pp. 572-573 of the report:

> In reply to the first ground, learned counsel for the plaintiff states that this court, in deciding whether or not the letter of undertaking is conditional or unconditional, should restrict itself to looking at the document itself and the words found therein. On doing this, it will be seen that no mention is made of any conversation between the credit officer and Abdul Roni nor to any commission payable to Ahmad Padli. The undertaking is clearly expressed in unconditional terms. In effect, what learned counsel for the plaintiff submits is that the court should not look outside the document or import extrinsic evidence to contradict the very clear and unambiguous terms of the undertaking. I find there is merit in this submission because what the defendants have sought to do by para 6 of Abdul Roni's affidavit is to introduce extrinsic evidence about the 'agreement' of the plaintiff's credit officer not to act on the undertaking so as to contradict the terms of a written document. The defendants' attempt is contrary to the provisions of ss. 91 and 92 of the Evidence Act 1950, whereby s. 91 excludes extrinsic evidence from being adduced in proof of the terms of a document except the document itself and s. 92 of which prohibits the admission of extrinsic evidence by the parties thereto, to, *inter alia*, contradict the terms of a document. In the case of *United Malayan Banking Corp Bhd v. Tan Lian Keng & Ors* [1990] 1 MLJ 280, Edgar Joseph Jr J (as his Lordship then was), in dealing with a case in which a party thereto tried to introduce extrinsic evidence to contradict the terms of a guarantee and indemnity, sounded a caution that where from time to time an attempt is made to adduce evidence of negotiation on the grounds that it is part of the 'matrix of fact', the temptation to do so ought to be resisted. I intend to do just that in this case by holding that in construing the terms of the undertaking, I must ignore evidence of the alleged 'agreement' with the credit officer of the plaintiff as such evidence is to be excluded and remain inadmissible under the provisions of ss. 91 and 92 of the Evidence Act 1950. I accordingly hold that the undertaking is unconditional in terms.

Be that as it may, even if the first defendant was also the executive chairman of the second defendant as alleged by the plaintiffs, that cannot take the plaintiffs' arguments anywhere at all. As an executive chairman of either Rajo Sdn Bhd or the second defendant, the first defendant just like a director cannot be held liable for the decisions he made on behalf of the company. By way of an analogy, the case of *Re Application By Yee Yut Ee* [1978] MLJ 142 should be referred to. There, Choor Singh J had this to say at p. 144 of the report:

> It is however a cardinal principle of company law that except in cases of fraud, breach of warranty of authority and other exceptional circumstances, a director is not liable for the debts of an incorporated company. There is nothing in the Companies Act (Chapter 185) which makes a director personally liable for the debts of the company. Nor is there anything in the Industrial Relations Act (Chapter 124) which modifies this fundamental doctrine of company law. No one would ever volunteer to be a director of an incorporated company if he or she was to be hold liable in law for the debts of the company.

Next, it would be the case of *Biggerstaff v. Rowatt's Wharf, Limited, Howard v. Rowatt's Wharf, Limited* [1896] 2 Ch 93 where Lopes LJ writing a separate judgment had this to say at p. 104 of the report:

> Maule J went further than this, and his judgment is an authority for the broad proposition that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their apparent authority.

In the affidavits in encl. 30 at para. 16 and in encl. 35 at para. 17, the averments thereto showed that the first defendant had during a discussion with the plaintiffs stated that the first defendant would pay the plaintiffs' claim if the second defendant did not do so. But these averments must be viewed against the background of the letter in exh. "MK7" of encl. 28 that was reproduced earlier and when so viewed it was quite plain that there was an attempt by the plaintiffs to introduce extrinsic evidence to dispute the terms contained in the written document, namely, that letter in question and this was clearly against the provisions of ss. 91 and 92 of the Evidence Act 1950. On this point, the decision of Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corp Bhd v. Tan Lian Keng & Ors* [1990] 1 MLJ 280 merits reference. At p. 281 of the report, his Lordship Edgar Joseph Jr J (as he then was) in style said:

> In my opinion, the Evidence Act 1950, by s. 91 excludes extrinsic evidence being adduced of the terms of a document by providing that no evidence may be given in proof thereof except the document itself and by s 92 an interdict is imposed on the admissibility of extrinsic evidence being adduced by the parties thereto in variance or in contradiction or in addition or in substraction of the **terms** of a document. (Emphasis added).

The English case of *John Pym v. Robert Campbell & Ors* [1856] 119 ER 903 provides a good illustration of the provisions of ss. 91 and 92. In that case, Erle J said at p. 904:

> The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional and if that had been so it would have been wrong. But I am of the opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement, and, if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive, and cannot be varied by parol evidence ... but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. **The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible**. (Emphasis supplied).

The law in India on this point (with which ours is in *pari materia*) is the same as that in England and this appears from the judgment of Sir John Wallis who, when speaking for the Judicial Committee of the Privy Council in *Tyagaraja Mudaliyar & Anor v. Vedathanni* AIR 1936 PC 70, referred with approval to the above passage in the judgment of Erle J.

I hasten to add that from time to time the attempt is made to adduce evidence of negotiations on the ground that it is part of 'the matrix of fact'. The temptation to do so ought to be resisted.

And finally at p. 282, his Lordship rounded up the matter in these words:

> To revert to the specific issue before me, it is my opinion that the effect of admitting extrinsic evidence of the 'understanding' would be to vary or to contradict the terms of the guarantee and indemnity and this would fall foul of the provisions of ss. 91 and 92.

It must be recalled that in the early part of 1993, all the shares that were held by MKN Holdings in Rajo Sdn Bhd were sold by MKN Holdings to Mohamed Kamal bin Hussain. It must also be recalled that the plaintiffs were appointed to commence the special task sometime in the beginning of June 1993 as seen in the letter in exh. "MK7" of encl. 28. Now, faced with these factual matrix, it can be inferred that whatever action taken by the first defendant it was solely for the benefit and in the interest of Rajo Sdn Bhd. As such it was impossible for the first defendant to inform the plaintiffs that he will pay them the said claim in the event that the second defendant did not do so.

It was part and parcel of my judgment that whatever claims the plaintiffs may have, if any, should be made against Rajo Sdn Bhd or the second defendant and certainly not against the first defendant.

For the reasons adumbrated above, I must answer the preliminary issues in this way. That the first defendant is not the right and proper party in these proceedings. That, notwithstanding the consideration advanced by the plaintiffs, the first defendant is not liable to pay the plaintiffs in his personal capacity and, consequently, the plaintiffs' claim against the first defendant should be dismissed with costs.